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No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1935.

THE UNITED STATES, PETITIONER

v.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

No opinion was rendered by the United States District Court for the Northern District of California. The opinion of the Circuit Court of Appeals (R. 51–56) is reported in 75 F. (2d) 41.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1935. (R. 56–57.) The petition for a writ of certiorari was filed April 27, 1935 and was granted October 14, 1935. (R.

58.) The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether the State of California in the operation of the state-owned State Belt Railroad is a common carrier engaged in interstate commerce by railroad.

2. Whether, if the State is such common carrier, it is subject to the provisions of the Federal Safety Appliance Act.

3. Whether the United States District Court had jurisdiction of the present suit to collect from the State the penalty prescribed for violation of the Act.

STATUTES INVOLVED

Section 2 of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. C., Title 45, Sec. 2), provides:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

By Section 1 of the Act of March 2, 1903, c. 976, 32 Stat. 943 (U. S. C., Title 45, Sec. 8), this pro-

vision, *inter alia* is made "to apply to all * * * cars, * * * used on any railroad engaged in interstate commerce."

Section 6 of the Act, as amended April 1, 1896, c. 87, 29 Stat. 85 (U. S. C., Title 45, Sec. 6) provides:

> Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; * * *.

Section 233 of the Judicial Code (U. S. C., Title 28, Sec. 341) provides:

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. * * *

STATEMENT

On May 25, 1932, the United States filed a complaint in the United States District Court for the Northern District of California against the State of California to recover the statutory penalty of $100 for a violation of the Federal Safety Appliance Act. (R. 2–4.) The complaint alleged that the State in the operation of the state owned State Belt Railroad was a common carrier engaged in interstate commerce by railroad and charged that it had committed a violation of the Act in hauling over said road a car upon one end of which the coupling and uncoupling apparatus was out of repair in such wise as to necessitate a man or men going between the ends of cars to couple or uncouple them. (R. 2–4.) The State entered a special appearance and demurrer asserting that this Court had exclusive jurisdiction of the controversy. (R. 6.) The demurrer was overruled (R. 7) and the State answered (R. 7–12).

A jury trial having been waived, the case was tried on stipulated facts. (R. 20–29.) Judgment was entered for the United States for $100, being the statutory penalty for a violation of the Act. (R. 15–16.)

The stipulated facts include the following:

The State Belt Railroad, owned by the State of California, is located wholly within the City of San Francisco, and is about five miles in length. (R. 21, 25.) It has physical connection with the tracks of the Southern Pacific Company, and its tracks

also run onto wharves owned by the State and used by freight car ferries of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, the Western Pacific Railway Company and the Northwest Pacific Railway Company, all common carriers in interstate commerce by railroad. (R. 21.) It also connects with, does all the switching in, and hauls all cars entering and leaving certain adjacent freight yards of these four carriers, owned by the State and used by the carriers under agreement. (R. 21.) Its tracks also run onto about forty-five state-owned wharves on which freight is loaded from steamers. (R. 21.) Its tracks also connect, at various points along its line, with approximately one hundred and seventy-five industries. (R. 21–22.)

None of the tracks of the Belt Railroad is used by the carriers mentioned except for interchanging cars and only its own locomotives move over any part of its tracks. (R. 23.) The State owns no cars. (R. 23.)

All of the industries, wharves, car ferries, and freight yards above-mentioned are served exclusively by the Belt Railroad in the movement of loaded and empty cars. (R. 22.) It also moves carload freight and empty cars from and onto Southern Pacific transfer tracks owned and operated by the Southern Pacific for the use of shippers or consignees who do not own industrial or private tracks, such movement being for the limited purpose of interchanging cars under an agree-

ment conferring trackage rights over such tracks upon the Belt Railroad. (R. 22.)

The Belt Railroad moves all carload freight and empty cars between the industries, wharves, car ferries, freight yards, and transfer tracks mentioned, whether consigned to or from points within or without the State, including those having both destination and origin without the State. (R. 22.) No distinction is made between cars owned by railroads operating within or exclusively without the State. (R. 22.) It moves all cars offered to it by the industries, the steamship companies, the carriers, and the shippers using the transfer tracks. (R. 22.) It moves between the Presidio and the steamship docks, car ferries, freight yards, and transfer tracks cars originating both within and without the State and consigned to or from the Presidio. (R. 22–23.)

The Belt Railroad is not a party to any through rate for the transportation of any shipment nor does it move shipments on through waybills. (R. 23.) It charges a flat rate regardless of point of origin or destination for moving cars between two points, its rate for a loaded car being a little higher than that for an empty car. (R. 23.)

On inbound freight shipments cars are moved to points on the Belt Railroad on so-called "switch lists" which are made out by the delivering carrier and which show the number and initials of each car, whether loaded or empty, and the point of de-

livery or final destination on the Belt Railroad. (R. 23.) The carrier delivering the car retains the original waybill, which shows the point of origin, car number and initials, contents, consignee and ultimate destination on the line of the Belt Railroad, and the through rate to such ultimate destination. (R. 23.) The through rate includes the Belt Railroad switching charge which is absorbed by the carrier and paid by it to the Belt Railroad. (R. 23–24.) On outbound shipments the "switch list" is made up by an agent of the carrier to which the Belt Railroad is to deliver the car and shows the number and initials of the car, whether loaded or empty, and the place where it is to be spotted. (R. 24.) Concurrently, the agent, having first received a shipping order from the consignor, makes out and delivers to the carrier a waybill for the movement of the car to ultimate destination showing, in addition to the things heretofore mentioned, the consignor, point of origin, and ultimate destination of the car. (R. 24.) The car is then moved on the "switch list" by the Belt Railroad and is delivered to the carrier which continues the transportation to the final destination named in the waybill. (R. 24.) The switching charge on outbound shipments is absorbed and collected in the same manner as that on inbound shipments. (R. 24.) If a car is moved between two points on the line of the Belt Railroad without delivery to any carrier the Belt Railroad collects the switching

charge from the individual or industry requesting such movement. (R. 24.)

A large majority of the daily movements over the Belt Railroad for the year 1932 were carload shipments of freight either originating in states other than California and destined to consignees on the Belt Railroad or originating on the Belt Railroad and destined to consignees in states other than California. (R. 24–25.) Many of the cars so hauled by the Belt Railroad during that year both originated in and were consigned to points in states other than California. (R. 25.) A considerable portion of the traffic so handled by it originated in, or was destined to, foreign countries. (R. 25.)

The Belt Railroad is operated by the Board of State Harbor Commissioners who are appointive state officers. (R. 25.) It is operated under the immediate supervision of a superintendent who is appointed by the Board, is under its supervision and control, and holds office at its pleasure. (R. 26). All inspectors, engineers, and yardmen employed in operating the Belt Railroad, except in cases of emergency employment, are civil service employees of the State. (R. 26–27.)

The Belt Railroad is operated by the State of California for the sole purpose of facilitating, for the benefit of its people, the commerce of the port of San Francisco without any profit being derived therefrom, and its operation is considered necessary by the State for such purpose. (R. 26.) The charges made for its services are fixed by the Board

pursuant to authority conferred by Section 2524 of the Political Code of California which authorizes the Board to collect such an amount of revenue as will enable it to perform the duties required of it by Article IX of the Code. (R. 26.) The Code limits the amount of such charges to a sum sufficient to meet the operating expenses of the harbor. (R. 26.) All revenue received for the services rendered by the Belt Railroad are paid to the Board which under the laws of the State must pay the same at least once a month into the State Treasury to be credited to the San Francisco Harbor Improvement Fund. (R. 25.) The Belt Railroad is not an incorporated company or a distinct agency of the State, but is a name adopted by the Board to designate it as one of the many diversified instrumentalities of the Board. (R. 25.)

On February 20, 1932, the Belt Railroad in a movement consisting of a number of cars, hauled over its line Western Pacific Car No. 16113 loaded at a point in California with freight consigned to Hawaii upon which car the coupling and uncoupling apparatus was out of repair as alleged in the complaint. (R. 27.) The Belt Railroad maintains no repair shops. (R. 27.) The defects in this car could have been repaired in a few minutes without the necessity of sending it to any repair shop. (R. 27–28.) Neither the Board nor any member thereof had personal knowledge of the defective condition. (R. 28.)

On appeal the Circuit Court of Appeals reversed the judgment of the District Court. (R. 56–57.) The Circuit Court of Appeals expressly limited its consideration to the question of jurisdiction of the District Court (R. 51) holding that this Court had exclusive jurisdiction of the controversy and that consequently the District Court erred in overruling the demurrer (R. 56). In the course of determining this issue, however, the Circuit Court of Appeals stated that the State in its operation of the State Belt Railroad was not a common carrier and was not subject to the Safety Appliance Act. (R. 54–56.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Ninth Circuit erred:

1. In holding that the State was not subject to the Safety Appliance Act.

2. In holding that this Court has exclusive jurisdiction of a suit to collect from a State a penalty for violation of the Safety Appliance Act.

3. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

I. The Safety Appliance Act applies to "any common carrier engaged in interstate commerce by railroad." The State of California, in the operation of the State Belt Railroad, is such a common carrier. It performs the usual functions of a terminal railroad, accepting and transporting all car-

load freight moving to or from the many industrial plants located along its line and originating on or destined to the lines of connecting interstate railroads and steamship companies. It also acts as a link in the through shipment of freight carried in interstate and foreign commerce by such railroads and steamship companies. It holds itself ready to move all freight offered, and a large part of the freight transported by it has its origin or destination (or both) in States other than California. The fact that it does not issue through bills of lading or that it receives payment for its services from the carriers on a per car basis does not prevent it from being a common carrier engaged in interstate commerce.

II. The State of California in its operation, as a common carrier, of the State Belt Railroad is subject to the provisions of the Safety Appliance Act. That Act applies broadly to *any* common carrier. The power of the Federal Government to regulate state-owned railroads engaged in interstate commerce would seem beyond doubt. Activities of that character constitute a departure by the State "from usual governmental functions" and are not immune from Federal taxation. *Helvering* v. *Powers,* 293 U. S. 214, 225. *A fortiori* they are not immune from the Federal commerce power. There is no rational basis for reading an exception into this statute in favor of state-owned railroads. When a State engages in activities which constitute

it a common carrier by railroad in interstate commerce it falls within the reach of the Safety Appliance Act. *Ohio* v. *Helvering*, 292 U. S. 360, 371.

III. The District Court had jurisdiction under section 6 of the Safety Appliance Act of this suit to recover from the State of California the penalty prescribed for violation of the Act. Congress has the power under the Constitution to vest the lower Federal courts with jurisdiction of suits by the United States against a State. *Ames* v. *Kansas*, 111 U. S. 449. It would seem clear that Congress intended by section 6 to make the District Courts the forum for all suits under the Safety Appliance Act. To the extent that such suits may involve States, section 6, being the later statute, impliedly repealed the provision of the Judiciary Act (now Section 233 of the Judicial Code) vesting, with some exceptions inapplicable here, exclusive jurisdiction in this Court of suits in which a State is a party. If considerations of policy are resorted to in determining whether Congress intended by section 6 of the Safety Appliance Act to vest the District Court with jurisdiction of this suit, it is submitted that the weightier considerations support the view that Congress did so intend.

ARGUMENT

I

THE STATE OF CALIFORNIA IN THE OPERATION OF THE STATE-OWNED STATE BELT RAILROAD IS A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE BY RAILROAD

This Court has stated that whether a transportation agency is a common carrier "does not depend upon whether its charter declares it to be a common carrier, nor upon whether the State of incorporation considers it to be such; but upon what it does." *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304. Manifestly, the issue as to whether a railroad is a common carrier is in no way affected by the fact that it is owned by a state which may not deem it to be a common carrier, or is not operated under a charter which declares it to be such, or, as here, is not operated under any charter at all.

Viewed in the light of "what it does", there seems little doubt that the activities of the State Belt Railroad are such as to constitute it a common carrier by railroad. It runs along the waterfront of the San Francisco harbor, connecting with approximately 175 industrial plants. It runs onto wharves where connection is made by freight car ferries with four railroads engaged in interstate commerce. It connects with the freight yards used by these railroads. It runs onto some 45 state-owned wharves used by steamship companies. It

moves all cars offered it by the railroads, the steamship companies, and the industrial plants. It transports all carload freight and empty cars between the industries, wharves, car ferries, and freight yards, whether destined to points within or without the state, or whether originating within or without the state, including shipments consigned both to and from points outside the state. These industries, wharves, car ferries and freight yards are served exclusively by the State Belt Railroad. A large majority of its traffic has its origin or destination (or both) in states other than California, and a considerable portion originates in, or is destined to, foreign countries. (*Supra*, pp. 4–8.)

The functions which the State Belt Railroad performs, as between the industrial plants along its line, on the one hand, and the four railroads and steamship lines on the other, is that of a terminal railroad. It also constitutes a link in the through transportation of freight carried by the railroads and steamship companies. That its duties are those usually performed by terminal roads was recognized by the court below, which stated (R. 51):

> It receives from and delivers to common carriers engaged in interstate commerce railroad cars in interchange at San Francisco, switches cars to and from the wharves and industries there, and engages in the duties usually performed by terminal railroads.

The services performed by the State Belt Railroad are not substantially different from those of

the Brooklyn Terminal, which this Court held in *United States* v. *Brooklyn Terminal, supra,* to be a common carrier engaged in interstate commerce by railroad within the meaning of the Hours of Service Act. In that case it appeared that the Brooklyn Terminal operated a freight station under contracts with ten interstate railroads and several steamship companies, transporting freight by car floats from the railroad termini to its Brooklyn docks and thence by locomotive for a distance of a mile or less to freight houses or team tracks for unloading, and also receiving freight from shippers in Brooklyn, consigned to points on such railroads and similarly transporting the same by locomotive and car floats to the railroad termini. In that case, as here, the terminal railroad owned none of the cars which it transported and it was paid for its services not by the shipper or consignee, but by the railroad or steamship company for whose account it performed the transportation service.

This Court stated (pp. 304–306):

> The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *United States* v. *Baltimore & Ohio R. R. Co.,* 225 U. S. 306; 231 U. S. 274, 288. The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or manage-

ment, are used as an integral part of each railroad line, like the stockyards in *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25. The services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier.

* * * * * *

One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character;—that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier, *United States* v. *Sioux City Stock Yards Co.*, 162 Fed. Rep. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts, *Union Stockyards Co. of Omaha*

v. *United States,* 169 Fed. Rep. 404; *Belt Railway Co. of Chicago* v. *United States,* 168 Fed. Rep. 542; and under the Twenty-Eight Hour Law, *United States* v. *Sioux City Stock Yards Co., supra.*

While it is true that the Brooklyn Terminal, unlike the State Belt Railroad, issued through bills of lading, no reason appears why that fact should be deemed material. In *United States* v. *Union Stock Yard,* 226 U. S. 286, this Court held that a stockyards company and a junction railroad connecting the stockyards with interstate railroads, the stock of both being held in common ownership, were common carriers by railroad, although bills of lading were not issued by either company. And bills of lading were not issued by the railroads involved in *United States* v. *Sioux City Stock Yards Co.,* 162 Fed. 556 (C. C. N. D. Iowa); *Union Stockyards Co. of Omaha* v. *United States,* 169 Fed. 404 (C. C. A. 8th), and *Belt Railway Co. of Chicago* v. *United States,* 168 Fed. 542 (C. C. A. 7th). The functions performed by the roads involved in these three cases, which were cited by this Court in the *Brooklyn Terminal* case, *supra,* closely resemble those of the State Belt Railroad.

The fact that the State Belt Railroad receives payment for its services from the carriers on a per car basis affords no proper ground for distinguishing the *Brooklyn Terminal* case, *supra,* in which payment was "at the rate of 3 cents per 100 pounds of freight moving to or from points east of the

western termini of said railroads, and 4½ cents per 100 pounds on freight moving to or from points beyond such termini." (249 U. S. 296, 301–302.) In *Union Stockyards Co. of Omaha* v. *United States, supra,* (quoted by this Court in *United States* v. *Union Stock Yard,*[1] *supra,* p. 305) the stockyards company was held to be a common carrier engaged in interstate commerce by railroad within the Safety Appliance Act, although it moved only cars belonging to railroads with which it connected, did not issue any bills of lading, did not collect any charge for its services from shippers or consignees, did not participate in any through rate, but merely obtained from the railroads payment of fixed charges for its services on a car basis. See *Belt Railway Co. of Chicago* v. *United States, supra,* p. 544; *United States* v. *Sioux City Stock Yards Co., supra,* p. 558.

It would seem plain, therefore, that, although the functions of the State Belt Railroad, like those of the roads involved in the cases herein referred to, are of a special character, they are such as to constitute it a common carrier in interstate commerce by railroad. It holds itself ready to serve the many industrial plants located along its line and the interstate railroads and steamship companies with which it connects, and to serve as a link

[1] In this case, it appeared that the interstate railroads paid the junction company a fixed sum per car, except that compensation for moving less than carload freight was on a tonnage basis. (226 U. S. 286, 299–300.)

in the through transportation in interstate and foreign commerce of freight offered it by these railroads and steamship companies. In *United States v. Union Stock Yard, supra,* this Court stated (p. 305):

> They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them. In *Union Stock Yards Co. v. United States,* 169 Fed. Rep. 404, Mr. Justice Van Devanter (while a Circuit Judge), speaking for the Court of Appeals, said (406):
>
> "Its [the Stock Yards Company's] operations * * * include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all livestock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of livestock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does

> the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry livestock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct and actually does conduct, for hire a part of the transportation of every livestock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

And see *United States* v. *Atlanta Terminal Co.*, 260 Fed. 779 (C. C. A. 5th), certiorari denied 251 U. S. 559.

In *M'Callum* v. *United States*, 298 Fed. 373 (C. C. A. 9th), certiorari denied, 266 U. S. 606, the State Belt Railroad was held to be a common carrier in interstate commerce by railroad and this decision was followed in *Tilden* v. *United States*, 21 F. (2d) 967 (C. C. A. 9th). Nevertheless in the present case the court below has reached a different result, although in the court's opinion the road's duties are those "usually performed by terminal railroads" (R. 51). The court below apparently considered this Court's decision in *Sherman* v. *United States*, 282 U. S. 25, as having adjudicated that the State of California was not a common carrier by reason of its operation of the State Belt Railroad. But in that case this Court held only that the Board of State Harbor Commissioners

did not constitute a common carrier and reversed the judgment which the United States had obtained in a suit against the members of the Board. It was held that, as between the State and the members of the Board, who were only agents of the State, it was the State, and not the Board, which would constitute the carrier, but the Court expressly refrained from determining whether the State was a common carrier in interstate commerce by railroad within the Safety Appliance Act.

II

THE STATE OF CALIFORNIA IN ITS OPERATION, AS A COMMON CARRIER, OF THE STATE BELT RAILROAD IS SUBJECT TO THE PROVISIONS OF THE FEDERAL SAFETY APPLIANCE ACT

The stipulated facts clearly show a violation of section 2 of the Safety Appliance Act. The proviso in Section 4 of the Safety Appliance Act of April 14, 1910 (c. 160, 36 Stat. 299, U. S. C., Title 45, Sec. 13), permitting movements for the purpose of making repairs obviously does not apply because the movement here in question was not for such purpose, and the car could have been repaired in a few minutes without being moved to a repair-shop (R. 27). See *United States* v. *Erie R. R.*, 237 U. S. 402, 409. Nor is it material that neither the Board nor the State had knowledge of the defect, since the liability created is absolute. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 294–296; *Chicago, B. & Q. R. Co.* v. *United States*, 220 U. S. 559; *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580.

The Safety Appliance Act applies broadly to *any* common carrier engaged in interstate commerce by railroad. Unless, therefore, an exception is to be read into the statute where such a common carrier is owned by a state, California is subject to the provisions of the Act. And although the precise question here is as to the Safety Appliance Act, there is necessarily involved the question whether state-owned railroads are subject to the provisions of other Federal statutes regulating railroads and to the jurisdiction thereunder of the Interstate Commerce Commission. That the Commission regards this and other roads as subject to its jurisdiction though owned by a state is clear. *California Canneries Co.* v. *S. P. Co.*, 51 I. C. C. 500, 502–503; *United States* v. *Belt Line Railroad Co.*, 56 I. C. C. 121; *Texas State Railroad*, 34 I. C. C. Val. R. 276. This Court has not yet passed upon this question. See *United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457, 461–462.

The power of the Federal Government to regulate state-owned railroads engaged in interstate commerce would seem beyond doubt. This conclusion follows *a fortiori* from the decisions of this Court rejecting the claim of immunity from the Federal taxing power made with respect to similar state enterprises. *Helvering* v. *Powers*, 293 U. S. 214 (operation of a street railway); *South Carolina* v. *United States*, 199 U. S. 437 (sale of liquor

under a dispensary system); *Ohio* v. *Helvering*, 292 U. S. 360 (sale of liquor through state owned stores). These cases hold that where a state engages "in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend", the state is not immune from Federal taxation. *Helvering* v. *Powers*, *supra*, p. 225. "The fact that the state has power to undertake such enterprises, and that they are undertaken for what the state conceives to be the public benefit, does not establish immunity" (*Ibid*). To hold otherwise would enable the States indirectly to cripple the Federal taxing power. *South Carolina* v. *United States*, *supra*, pp. 454–455.

In *Helvering* v. *Powers*, *supra*, this Court stated (p. 227):

> * * * If, in the instant case, the commonwealth had acquired the property of the company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power.

And in *South Carolina* v. *United States*, *supra*, the Court, in discussing the consequences of sus-

taining the claim of immunity there made, referred to the possibility of state ownership of the entire railroad system (199 U. S. 437, 454).

In *Georgia* v. *Chattanooga,* 264 U. S. 472, 481, 482, the Court characterized the construction by Georgia of a railroad in Tennessee as a "private undertaking" with respect to which Georgia was in the same position as "a private corporation authorized to own and operate a railroad", and had "divested itself of its sovereign character." And see *United States* v. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 2 Pet. 318, 323; *Curran* v. *Arkansas,* 15 How. 304, 308.

It is plain that a state-owned railroad would not be immune from the Federal taxing power. So far as the commerce power is concerned it is not clear that any immunity is properly to be implied in favor of the states, but assuming that such immunity exists, it is manifestly no more extensive than the immunity from Federal taxation. See *Board of Trustees* v. *United States,* 289 U. S. 48, 59. The considerations upon which the immunity would be denied in the one case apply equally to the other. The Constitution vests the power to regulate interstate commerce in the Federal Government, and in this field its power is supreme. A state could obviously not endow corporations with immunity from Federal commerce regulations such as those embodied in the Safety Appliance Act, nor could it pass laws dealing with the same subject.

matter. *Southern Ry. Co.* v. *R. R. Comm. Indiana,* 236 U. S. 439; *Gilvary* v. *Cuyahoga Valley Ry.,* 292 U. S. 57, 60–61. It is equally obvious that it cannot by itself undertaking the operation of railroads engaged in interstate commerce nullify the power of the Federal Government to regulate such railroads. A contrary view would logically result in the automatic loss of control by the Federal Government over all activities in interstate commerce which the states see fit to undertake.

Since, therefore, the Federal Government clearly has the power to regulate state-owned railroads engaged in interstate commerce, no sound reason appears for excepting them from the operation of existing Federal statutes. The language of the Safety Appliance Act affords no basis for such an exception for it embraces *any* common carrier. Appellee relies upon the rule that a sovereign is not bound by a statute unless specifically named. *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 152; *United States* v. *Herron,* 20 Wall. 251; *In re Fowble,* 213 Fed. 676 (Md.). Each of these cases involved the application of a statute against the enacting sovereign. This rule has its historical basis in the English practice by which the Crown is held to be unaffected by Acts of Parliament not specifically directed against it. *United States* v. *Herron, supra,* p. 255; *Savings Bank* v. *United States,* 19 Wall. 227, 239. The historical basis for this rule of statutory construction clearly indi-

cates that it has application only to the enacting sovereign.[2]

Even if this rule may be deemed applicable by analogy to sovereigns other than the enacting sovereign, there is plainly no basis for its application in the present case, where a state, engaged in a private undertaking, claims to be excepted from a Federal statute regulating all such undertakings under the commerce power delegated by the states under the Constitution to the Federal Government. The state by undertaking the operation of the railroad has to that extent divested itself of sovereignty and has in that respect placed itself in the same position as private individuals or corporations engaged in such enterprise. There is no basis for assuming that Congress intended to distinguish between state and privately owned railroads. Clearly the safety of the employees and of the property transported is equally imperiled, and the progress of interstate traffic is equally impeded, whether defective appliances are used on a state owned or privately owned highway of interstate commerce. See *Southern Ry. Co.* v. *United States,*

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[2] In *New York* v. *Irving Trust Co.*, 288 U. S. 329, upon which the court below relied (R. 56) the question as to whether this rule of construction is applicable to a different sovereign was apparently not in issue, for the Court stated (p. 331):

"It is admitted here, that as the United States and the States are not mentioned in the limitation of § 57, they are not bound thereby."

222 U. S. 20, 27. And see *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. So. Car.).[3]

In *Ohio* v. *Helvering, supra,* the Federal statute imposed a tax upon every person dealing in intoxicating liquors, and person was defined to include a corporation. The statute did not explicitly include states. The Court held that "the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension" (292 U. S. 360, 371). So here, where a state engages in the operation of a railroad, as a common carrier, it falls within the reach of the Safety Appliance Act, the provisions of which are expressly made applicable to *any* common carrier in interstate commerce by railroad.

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[3] In this case it was held that a railroad operated by a municipality was subject to the Federal Employers' Liability Act. The court stated (p. 915):

"The language of the act is broad. It says: 'Every common carrier by railroad while engaged in commerce, etc.' (45 USCA § 51). Every reason which could be urged upon Congress for the passage of this act in reference to railroads operated by private capital can be urged with equal force as to railroads operated by municipalities. Congress intended to and did occupy the whole field, and all state laws upon the subject, insofar as they cover the same field, are superseded."

And see *New Orleans Public Belt Railroad Construction,* 166 I. C. C. 761, and *New Orleans Public Belt Railroad Bridge Bonds,* 189 I. C. C. 156, where it is assumed without question that a railroad owned by a municipality is subject to the Interstate Commerce Act.

III

SECTION 6 OF THE SAFETY APPLIANCE ACT GIVES THE UNITED STATES DISTRICT COURT JURISDICTION OF THE PRESENT SUIT TO COLLECT FROM THE STATE OF CALIFORNIA THE PENALTY PRESCRIBED FOR VIOLATION OF THE ACT

Congress has the Constitutional power to give to the United States District Courts jurisdiction of suits by the United States against a State. "The judicial power", as defined in the United States Constitution, Article III, extends to suits by the United States against a State. *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *Texas,* 143 U. S. 621, 644, 645; 162 U. S. 1, 90; *United States* v. *Michigan,* 190 U. S. 379, 396; *Oklahoma* v. *Texas,* 258 U. S. 574, 581; *United States* v. *Minnesota,* 270 U. S. 181, 195; cf. *Monaco* v. *Mississippi,* 292 U. S. 313, 329. The reasons for this rule were well stated in *United States* v. *Texas, supra,* where it was said (pp. 644–645):

> We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endan-

gered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law.

Moreover, Congress can, if it chooses, provide that this judicial power over a suit between the United States and a State shall be exercised by inferior courts established by Congress. *Ames* v. *Kansas,* 111 U. S. 449; *United States* v. *Louisiana,* 123 U. S. 32. In the first of these cases, the State of Kansas had brought suit in its own courts against a corporation created under federal law upon a cause of action arising under the laws of the United States. The defendant corporation removed this case to the United States Circuit Court. The State objected to this removal and sought a remand to the state court on the ground that Congress as a matter of Constitutional power could not authorize, and as a matter of statutory power had not authorized, suit in the Circuit Court where a State was a party. This Court in over-ruling the objections held that it was "within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." In the second case, *United States* v. *Louisiana, supra,* it was held that the Court of Claims had jurisdiction to entertain a suit by the State of Louisiana against the United States.

In the two cases cited, it is true, the action was brought *by* a State, and not *against* it. But the Constitutional principle is the same whether the

suit in an inferior Federal court is brought with or without the consent of the State. This is shown by *Ames* v. *Kansas, supra,* where the State objected to having its suit removed to an inferior court of the United States. And it is also demonstrated by *Börs* v. *Preston,* 111 U. S. 252, (a case much relied upon in *Ames* v. *Kansas, supra*) which held that consuls, who, like States, may, under United States Constitution, Article III, be parties to original actions in the Supreme Court, can also be sued in inferior courts of the United States, if Congress so provides.

The Constitutional power of Congress being clear, the only question is whether, as a matter of statutory interpretation, Congress has in fact exercised this power to grant to the United States District Courts jurisdiction of a suit brought by the United States against a State for violation of the Safety Appliance Act.

Section 6 of the Safety Appliance Act, as amended April 1, 1896, c. 87, 29 Stat. 85 (U. S. C., Title 45, Section 6) provides:

> Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district

> attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; * * *

On its face this section embraces all suits for penalties against "any common carrier engaged in interstate commerce", whether that carrier be a private corporation or a State; and this broad literal interpretation has particular force because of the general procedure which the section embodies. It selects as an appropriate forum for trial of a violation of the Act "the locality where such violation shall have occurred." Presumably, this choice was made in order to make it relatively easy for railroad workers, travelers, shippers, and others who in ordinary course would feel aggrieved to lodge a "duly verified information" and to testify. If the alleged offender were to be tried elsewhere than in the neighborhood, workers, travelers, shippers, and others might be less inclined to complain or to volunteer their testimony, and thus the policy of the Safety Appliance Act might be indirectly frustrated. Moreover, that Congress intended the United States District Court to be the forum for all suits under the Safety Appliance Act appears from the fact that the very provision which imposes the penalty also stipulates that it "be re-

covered in a suit or suits to be brought * * * in the district court of the United States."

The contrary view that Section 6 should be read narrowly, and suits against a State exempted from its operation, rests on two arguments: the first, one of technical statutory construction; and the second, one of policy.

The technical argument is based on Section 13 of the Judiciary Act of 1789, c. 20, 1 Stat. 73, 80, which, as amended from time to time is now embodied in Section 233 of the Judicial Code (U. S. C., Title 28, Sec. 341), *supra,* p. 3. It is argued that the Judiciary Act conferring upon this Court "exclusive jurisdiction of all controversies of a civil nature where a State is a party" states the applicable procedure. If it be assumed that the present suit is not alone a civil action, but also one "of a civil nature", (but see *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265), and that an irreconcilable conflict exists between the two statutes, on general principles of statutory construction it is the later statute which governs and which impliedly pro tanto repeals the earlier statute. *United States* v. *Yuginovich,* 256 U. S. 450, 463; *United States ex rel Chandler* v. *Dodge County Commissioners,* 110 U. S. 156; *United States* v. *Tynen,* 11 Wall. 88, 92. This principle makes Section 6 of the Safety Appliance Act the governing statute in this case, since it is the later statute. Section 13 of the Judiciary Act of 1789 has not been reenacted since 1893, the

date of the original Safety Appliance Act, but has been merely carried forward into the Judicial Code and the United States Code. In neither case is this codification the equivalent of a reenactment. Section 297 of the Act of March 3, 1911, c. 231, 36 Stat. 1169; Section 2 (a) of the Act of June 30, 1926, c. 712, 44 Stat. 1 (Part 1); *Smiley* v. *Holm,* 285 U. S. 355, 373.

It is also argued that there is a general policy against allowing a case involving a State to be adjudicated elsewhere than in this Court. *Ames* v. *Kansas, supra,* indicates that there is no such policy, for in that case, as already pointed out, an inferior court was held to have jurisdiction of a case involving a State even though the State objected. And if there were such a policy, it should be restricted to suits involving the action of a State in its sovereign, and not in its proprietary, capacity. When a State engages in a business of a private nature, it should not be immune from the burdens which apply to others who engage in like enterprises. Cf. *Ohio* v. *Helvering,* 292 U. S. 360; *Board of Trustees* v. *United States;* 289 U. S. 48; *South Carolina* v. *United States,* 199 U. S. 437.

Finally, it may be suggested that if considerations of policy are indulged, there should be weighed against any asserted inconvenience and loss of dignity to a State in being subjected to a trial in the District Court, the inconvenience to this Court, and the departure from its ordinary functions, in taking or analyzing evidence with respect to offenses usu-

ally involving unimportant issues of law and minor penalties. In construing the Judiciary Act of 1789, and determining the exclusive jurisdiction of this Court, practical difficulties and "tacit assumptions" ought to be taken into account. Cf. *Popovici* v. *Agler,* 280 U. S. 379, 383. One set of such practical difficulties would arise from a trial before this Court, or argument before this Court on the basis of evidence taken before a Commissioner with respect to a cause of action arising in a distant place. Indeed it is not clear that there might not be a jury trial in this Court instead of proceedings before a Commissioner. Although such a trial is not required by the Seventh Amendment to the United States Constitution or by any statute, it could be prescribed by this Court in suits at law before its bar in order to conform with the procedure in other courts which try cases at law. Cf. *State of Georgia* v. *Brailsford,* 3 *Dallas* 1 (where this Court prescribed a jury trial, although one of the defendants was an alien, and hence not entitled by statute to trial by jury). Such trials, or, indeed, any proceedings involving nothing more than the factual analysis and summation of the sort of evidence customary in cases arising under the Safety Appliance Act would be a serious burden to a tribunal entrusted with the important functions and burdened with the crowded docket of this Court.

CONCLUSION

In view of the foregoing, we respectfully submit that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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DECEMBER, 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935